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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALI SALEH KAHLAH AL-MARRI Plaintiff, v. ROBERT M. GATES, Secretary of Defense of the United States, COMMANDER JOHN PUCCIARRELLI, U.S.N. Commander, Naval Consolidated Brig, Defendants.	)	Civil A. No. 2:05-cv-02259-HFF-RSC

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR INTERIM RELIEF REGARDING CONDITIONS OF CONFINEMENT

Defendants hereby respond to plaintiff's motion for interim relief (dkt. no. 40) ("Pl's Mot."), which seeks extraordinary court intervention and superintendence of various conditions of plaintiff's detention by the Department of Defense ("DoD") at the Naval Consolidated Brig, Charleston, South Carolina ("the Brig"). Plaintiff's conditions of confinement are not only safe and humane, but provide him with a number of accommodations and privileges rarely seen in the military detention of enemy combatants. He not only has adequate opportunities for human interaction, exercise, and intellectual stimulation (including a 300+ volume Islamic library, personal laptop computer, television, and exercise equipment), his physical and mental health is regularly monitored, with appropriate care available if needed. Accordingly, plaintiff cannot demonstrate that he will experience imminent irreparable injury without interim relief. Further, the relief plaintiff seeks will result in significant burdens upon and harms to the military. Petitioner also cannot establish a

likelihood of success on his claims in light of serious jurisdictional and sovereign immunity issues existing in this case, the significant legal authority requiring courts to accord substantial deference to the judgment of Executive authorities regarding the operation of detention facilities – principles that apply with special force in this unique context of the military's detention of enemy combatants – as well as plaintiff's failure to establish under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 ("RFRA"), any substantial burden on the practice of his religion. Finally, the public has a strong interest in assuring that operations related to the detention and care of enemy combatants during a time of war are not overly burdened and second-guessed by the unnecessary demands of such combatants. Accordingly, petitioner fails to satisfy each of the requirements for interim injunctive relief, and his motion should be denied.

BACKGROUND

Plaintiff is a citizen of Qatar, who arrived in the United States on September 10, 2001. On June 23, 2003, the President designated plaintiff an enemy combatant, finding, *inter alia*, that he is "closely associated with al Qaeda" and "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism with the aim to cause injury to or adverse effects on the United States," and that his "detention is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States." *See Al-Marri v. Wright*, 378 F. Supp. 2d 673, 674 n.3 (D.S.C. Jul. 8, 2005). In July 2004 plaintiff filed a *habeas corpus* petition in this Court. The Court dismissed the petition, concluding that petitioner was lawfully detained as an enemy combatant after the government submitted evidence supporting that plaintiff is an al Qaeda sleeper agent sent to this country with instructions to facilitate terrorist activities subsequent to 9/11, including attacks regarding the U.S. financial system and possible chemical

attacks. *See Al-Marri v. Wright*, 443 F. Supp. 2d 774, 782-85 (D.S.C. Aug. 8, 2006). A panel of the Court of Appeals reversed, 487 F.3d 160 (4th Cir. Jun. 11, 2007), but on August 22, 2007, the Court of Appeals granted rehearing *en banc*. The case was argued on October 31, 2007, and a final decision by the *en banc* Court remains pending.

On August 8, 2005, plaintiff filed his complaint in this case challenging his conditions of confinement in the Brig. In October 2005 defendants moved to dismiss (dkt. no. 7). The possibility of settlement led the Court to dismiss the case without prejudice to reinstatement should a settlement not be consummated (dkt. no. 24). Plaintiff subsequently moved to reinstate the case and requested a hearing on defendant's motion to dismiss (dkt. no. 28). In June 2006 the Court reinstated the case and directed the parties to address whether plaintiff should be required to amend his complaint in light of any changes to plaintiff's conditions of confinement (dkt. nos. 29, 30). Presumably in light of the pendency of the appeal of plaintiff's separate *habeas* case, further proceedings have not been held in this case. Plaintiff then filed his motion for interim relief related to his conditions of confinement on March 13, 2008 (dkt. no. 40). Plaintiff claims he is entitled to "regular and frequent" telephone calls with immediate family members overseas; "rapid" processing of his correspondence with family members (including letters and DVDs); "unrestricted access to news (in newspapers, in magazines, and on television);" and "full and prompt access to religious texts." *Id.*

ARGUMENT

"[T]he grant of interim relief [is] an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it." *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1992) (internal quotations omitted). Four factors must be considered on a motion for interim relief:

(1) the irreparable harm to the plaintiff if the motion is denied; (2) the harm to the defendant if the motion is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest. *See id*. at 812 (citing *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189 (4th Cir. 1977)). A court first determines whether the plaintiff has made a strong showing of irreparable harm if the injunction is denied. *See Scotts Company v. United Industries Corp.*, 315 F.3d 264, 271 (4th Cir. 2002). The plaintiff must demonstrate harm that is "neither remote nor speculative, but actual and imminent." *Direx*, 952 F.2d at 812. If such a showing is made, the court then balances the likelihood of harm to the plaintiff against the likelihood of harm to the defendant. *See Scotts*, 315 F.3d at 271 (citing *Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846, 859 (4th Cir. 2001); *Direx*, 952 F.2d at 812). Where a plaintiff fails to make a showing that the balancing of the hardships tips "decidedly" in his favor, then the plaintiff must demonstrate a strong probability of success on the merits in order to obtain interim injunctive relief. *See Direx*, 952 F.2d at 813-14. A court also must evaluate the public interest at stake in determining whether to grant the preliminary injunction. *Id.* at 814. And while the first two factors are considered first, "the plaintiff bears the burden of establishing that each of . . . [the four] factors supports granting the injunction." *See id.* at 812 (internal quotations omitted).

Even in the ordinary case, it is settled that "absent the most extraordinary circumstances, federal courts are not to immerse themselves in the management of . . . prisons;" indeed, preliminary relief directed to running a prison should be granted only in compelling circumstances. *See Taylor v. Freeman*, 34 F.3d 266, 268-69 (4th Cir. 1994). *See also infra* at 17-18, 31-32. That rule reflects separation-of-powers considerations that apply with special force in the case the detention of an enemy combatant in an ongoing armed conflict. Plaintiff, however, has failed to demonstrate such

extraordinary circumstances justifying injunctive relief related to his detention as an enemy combatant during a time of war.

I. PLAINTIFF HAS FAILED TO ESTABLISH THAT HE FACES IMMINENT IRREPARABLE INJURY.

Plaintiff's motion for interim relief should be denied because plaintiff has failed to carry his burden of establishing imminent irreparable injury. Plaintiff's motion attempts to paint a portrait of dire conditions and mental health crisis. As the record in this case, including the declarations of the Commanders of the Naval Consolidated Brig where plaintiff is housed submitted herewith, makes clear, however, plaintiff's detention arrangement provides him a number of accommodations and privileges rarely seen in the military detention of enemy combatants. Further, plaintiff has regular and meaningful opportunities for human interaction, intellectual stimulation, exercise, and communication with family members. In addition, plaintiff's mental health is regularly monitored, with appropriate, attentive care available as needed. *See* Declaration of Commander John Pucciarelli (Apr. 10, 2008) ("Pucciarelli Decl.") (attached as Exhibit 1); Declaration of Commander Stephanie L. Wright (July 15, 2006) (dkt. no. 32) ("Wright Decl.") (copy attached as Exhibit 2, for the Court's convenience).[1]

In asserting the existence of irreparable harm, plaintiff's motion relies heavily upon a series of allegations concerning plaintiff's conditions of confinement *in the past*. *See*, *e.g.*, Pl's Motion at 4-9. Defendants do not concede the accuracy of these allegations and, indeed, vigorously dispute

[1] Commander Wright's declaration was filed on July 14, 2006, as part of defendant's response to the Court's June 14, 2006 Order requiring the parties to advise the Court regarding whether plaintiff's then-existing conditions of confinement were such as to warrant plaintiff amending his complaint to reflect those conditions. *See* Dkt. No. 32.

many of the allegations. More to the point for purposes of plaintiff's request for *prospective*, interim injunctive relief, however, it is clear from the record in this case, as discussed below, that plaintiff's conditions have been anything but unlawful for at least the past two years. Indeed, plaintiff's allegations concerning past conditions or conduct are not material to plaintiff's requested prospective injunctive relief concerning conditions of confinement because a series of historical allegations manifestly does not establish an entitlement to forward-looking injunctive relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 105, 110 (1982); *O.K. v. Bush*, 377 F. Supp. 2d 102, 113-14 (D.D.C. 2005) (denying request by enemy combatant detained at Guantanamo Bay for injunction against interrogations where basis of request was a series of historical allegations that did not reflect practices in the present); *Hamdi v. Rumsfeld*, 542 U.S. 507, 539-40 (2004) (plurality opinion) (adjuring lower courts generally to "proceed with the caution that is necessary" and to take only "prudent and incremental" steps when faced with novel issues pertaining to *habeas corpus* petitions from wartime detainees).

A. Plaintiff's Conditions of Confinement Are Not Unlawful.

The declarations of Commanders Pucciarelli and Wright demonstrate that plaintiff's detention arrangement at the Brig is safe and humane. Plaintiff is housed in the Special Housing Unit ("SHU") of the Brig, necessarily separate from other Brig prisoners who are members of the U.S. military. *See* 10 U.S.C. § 812.[2] Plaintiff receives far more than basic necessities that include

[2] 10 U.S.C. § 812, *i.e.*, Art. 12 of the Uniform Code of Military Justice ("UCMJ"), states:

> No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces.

a sleeping cell; clothing; meals; personal hygiene items; and opportunities for recreation, personal hygiene, and religious practice. Plaintiff has an 80 square-foot sleeping cell meeting or exceeding American Correctional Association standards. Pucciarelli Decl. ¶¶ 3,15; Wright Decl. ¶¶ 12, 15. Moreover, from 5:30 a.m. until 10:00 p.m. (unless plaintiff is subject to contrary disciplinary restriction), plaintiff's sleeping cell remains unlocked, and he has free access to a 1,000 square-foot dayroom area adjacent to his cell, as well as other cells that have been converted, respectively, into an Islamic library (with 384 volumes) and study area and a storage area for legal documents. Pucciarelli Decl. ¶¶ 3, 11. The living area where plaintiff typically spends each day also includes a TV, personal computer, and an indoor exercise area containing a treadmill, elliptical trainer, and weight machine. Pucciarelli Decl. ¶ 3; Wright Decl. ¶¶ 43, 46 (noting that plaintiff is supplied with exercise clothes and shoes). Twice daily, plaintiff also is offered a two-hour outdoor exercise period (for a total of fours hours daily) in a 1,635 square-foot outdoor area. Pucciarelli Decl. ¶ 3; *see also* Wright Decl. ¶¶ 41-43.

Plaintiff also receives regular, nutritionally sound meals prepared in compliance with his specific religious dietary (Halal) requirements.[3] Pucciarelli Decl. ¶¶ 3, 10. (He has been permitted to tour the Brig galley and question the Brig Food Service Officer to verify this and has been provided a video of a local civilian Imam certifying that the galley is in compliance with Islamic dietary laws. *Id.* ¶ 10.)

Although plaintiff necessarily does not reside with military prisoners detained for violations of the UCMJ and is the only enemy combatant detainee held by DoD in the United States, he has

[3] Plaintiff has added muscle weight over approximately the last year, which the Brig attributes to his healthy eating and regular exercise routine. *See* Pucciarelli Decl. ¶ 8.

daily contact and interaction with various members of the Brig staff, including the shift supervisor; guards; medical corpsmen; and those involved in meal, mail, and other deliveries. Pucciarelli Decl. ¶ 4; Wright Decl. ¶ 34. Furthermore, the Brig has instituted other measures to ensure opportunities for plaintiff to interact with others. Plaintiff has regularly received visits from senior members of the Brig staff, now typically daily, Monday through Friday, with visits lasting from a few minutes to a few hours. Pucciarelli Decl. ¶ 4; Wright Decl. ¶¶ 34, 36-38. Plaintiff also receives regularly weekly visits from the Command Chaplain. Pucciarelli Decl. ¶ 4; *see also* Wright Decl. ¶ 34-35.

In addition, plaintiff generally receives weekly telephone calls from his attorneys, as well as visits from them every several weeks. He is also permitted privileged legal mail with his attorneys. Current Brig Commander Pucciarelli has never declined to permit a telephone call or visit by counsel, and in the rare case where such a contact could not be accommodated on the requested date, it has been permitted within 24 hours of the requested time. Pucciarelli Decl. ¶ 4; *see also* Wright Decl. ¶¶ 32-33.

Furthermore, the International Committee for the Red Cross has regular, unmonitored access to plaintiff. Pucciarelli Decl. ¶ 4; Wright Decl. ¶¶ 32-33, 40. In addition, he is permitted mail communications with his family, as well as video messages from his family, all subject to appropriate screening. Pucciarelli Decl. ¶ 12. DoD has also recently instituted a policy of permitting plaintiff telephone calls with family (who are located overseas), arranged by DoD. DoD has recently initiated a new policy of permitting most Guantanamo Bay detainees a yearly telephone call with family members for morale purposes, when appropriate monitoring and verification of call participant identities are possible. In light of his circumstances, plaintiff is being permitted two such

calls per year.[4] Arrangements for the first such telephone call for plaintiff are underway. Pucciarelli Decl. ¶ 13.

Not only does plaintiff have opportunities for interaction with others, DoD and the Brig have taken extraordinary measures to provide plaintiff with opportunities for intellectual stimulation. As noted above, plaintiff's living area has a dedicated study area and Islamic library with almost 400 volumes.[5] Pucciarelli Decl. ¶¶ 3, 11. Plaintiff also has a number of books on other subjects, including personal fitness, computer science, and the natural sciences, and counsel can supply others, including Arabic titles from a list of 1,500 (which has been supplied to counsel). *Id.* ¶ 11. Aside from plaintiff's personal access library, plaintiff also has access to the Brig's normal library holdings of more than 5,100 books[6] and the Chaplain's library of over 1,600 books. *Id.*¶ 14; Wright Decl. ¶ 47. He has also been provided access to various other computer and mathematics textbooks and CDs apart from the normal library holdings. *See* Pucciarelli Decl. ¶ 11.

Plaintiff is also provided newspapers, subject to redaction of stories involving the War on Terror. He receives weekly Arabic media news clippings, as well as weekday editions of *USA Today*

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[4] Plaintiff's counsel criticizes DoD for initially contemplating that family members receive the calls at a U.S. embassy nearest to them so that Embassy personnel could verify call recipient identities. Pl's Mot., Savage Decl. ¶ 60. Counsel complains that plaintiff's father and mother were unable to travel to an embassy. *Id*. While counsel have not explained why other members of plaintiff's family could not travel to an embassy for a call with plaintiff, the issue is moot given that DoD has been able to make other arrangements for satisfactory verification of call participant identities such that the telephone calls may take place outside of an embassy and nearer to the residence of plaintiff's father and mother.

[5] At plaintiff's request, 96 volumes of religious-themed texts have been approved for addition to plaintiff's library since November 2007. *See* Declaration of Brigadier General Gregory J. Zanetti ¶ 16 (Apr. 14, 2008) (attached as Exhibit 3).

[6] Plaintiff is permitted two books and three magazines from the library at a time and can exchange them for others daily. Pucciarelli Decl. ¶ 14; Wright Decl. ¶ 47.

and weekend editions of the *Charleston Post and Courier*. Pucciarelli Decl. ¶ 14. The Brig also subscribes for plaintiff to various magazines, *Men's Fitness*, *PC Magazine*, and *Consumer Reports*. *Id.*

The Brig has also taken the extraordinary step of providing plaintiff with a personal computer requested by counsel, which plaintiff can use for correspondence and for a database of Islamic writings. Pucciarelli Decl. ¶¶ 3, 11, 14. In addition, plaintiff's dayroom is outfitted with a television with access to cable channels (he is not permitted to watch news programs), and plaintiff is also permitted to view various entertainment or educational videos and DVDs and other movies. Pucciarelli Decl. ¶ 14; Wright Decl. ¶ 48.

The Brig is also sensitive to plaintiff's religious practices. He is allowed to pray when he desires and is provided a watch, a list of call-to-prayer times, the direction towards Mecca, and even a computer program that can alert him when it is time to pray. Pucciarelli Decl. ¶ 9; Wright Decl. ¶¶ 22-23. He has a Koran available at all times,[7] and also has access to other religious items such as a kufi (religious headgear), prayer rug, prayer oil, prayer beads, and a Miswak (chewing stick). Pucciarelli Decl. ¶ 9; Wright Decl. ¶ 24. As noted above, he has his own Islamic library (currently at 384 volumes) and a study area. Pucciarelli Decl. ¶ 11. Not only is he provided regular *halal* meals, the Brig has supplied him with dates and other traditional foods to support his religious observances, with members of the senior staff even driving to Columbia, South Carolina, to purchase such items for Almarri's use. *Id.* ¶ 9; Wright Decl. ¶ 26. The Brig also has assisted plaintiff's observation of Ramadan, which involves fasting during daytime hours, permitting plaintiff to change

[7] Plaintiff also was provided a portable CD player to listen to the Koran on CD. Wright Decl. ¶ 26.

his sleep-wake schedule so that most of his waking hours were at night when religious guidelines permitted him to eat. *See* Pucciarelli Decl. ¶ 9; Wright Decl. ¶ 26. He was also supplied with religiously appropriate meals that could be eaten at night in accordance with Ramadan practices. Pucciarelli Decl. ¶¶ 9-10; Wright Decl. ¶ 26.

Despite the numerous accommodations provided plaintiff by the Brig and DoD, plaintiff's motion for interim relief complains that plaintiff's privileges can be removed due to plaintiff's misbehavior. *See* Pl's Mot. at 2, 19. That, of course, does not distinguish plaintiff from virtually any other prisoner held in other contexts. While plaintiff's motion attempts to characterize the Brig as imposing disciplinary measures on plaintiff in a capricious fashion, *see id.*, this is hardly the case. Consistent with standard detention practice to promote safety and security of both detention staff and detainees, detainee privileges are maintained by good behavior and lost through noncompliance. *See* Pucciarelli Decl. ¶ 15; Wright Decl. ¶¶ 8-14. Plaintiff was previously provided a basic set of rules of conduct for the Brig. *See* Wright Decl. ¶ 8. Further, senior Brig staff have discussed the required standards of conduct with plaintiff at various times. Pucciarelli Decl. ¶ 15; Wright Decl. ¶ 8. Plaintiff also can inquire concerning, comment upon, and receive clarification of rules of conduct through direct correspondence with the Brig Commander, the so-called "chit" system. Pucciarelli Decl. ¶ 15; Wright Decl. ¶¶ 8, 39. Plaintiff is permitted two such chits per day and receives written responses from the Brig Commander. Pucciarelli Decl. ¶ 15; Wright Decl. ¶ 8, 39.

Incidents of non-compliance with standards of appropriate conduct are addressed through an elaborate process in which the infraction is reported to the Brig Commander, who, after consultation with senior staff, determines if the matter should be pursued. If so, the Commander notifies plaintiff in writing of his intent to take disciplinary action. Plaintiff is given 24 hours to submit a written

response. The Commander considers any response from plaintiff, as well as senior staff recommendations, in determining whether to sustain the allegation of noncompliance and impose a disciplinary sanction. *See* Pucciarelli Decl. ¶ 15; Wright Decl. ¶ 11. Plaintiff, however, is not necessarily disciplined for every incident of misbehavior or for such incidents when such behavior is judged not to be an intentional transgression of Brig rules. Pucciarelli Decl. ¶ 15. Further, any sanctions are directly related to plaintiff's noncompliance and are measured attempts to promote compliance with standards of conduct. *Id.*; *see* Wright Decl. ¶¶ 8-14. In addition, certain basic comfort items and activities are not subject to loss by plaintiff, including personal hygiene items, Koran, clothing, blanket, Brig-issued mattress and lumbar-support cushions, three showers per week, multiple indoor/outdoor exercise periods per week. Pucciarelli Decl. ¶ 15; Wright Decl. ¶ 12. Items may be subject to removal, however, if they are destroyed or become a hazard to plaintiff or Brig staff. Pucciarelli Decl. ¶ 15; Wright Decl. ¶ 12. Plaintiff's other religious observance items are also not subject to loss unless the items are destroyed or become a hazard to plaintiff or the Brig staff (such as a hard-cover book being used as a projectile). *See* Pucciarelli Decl. ¶ 15. Since at least July 2007, however, the removal of such items has not been required. *Id.*

Thus, the disciplinary process with respect to plaintiff is measured and regularized to promote plaintiff's compliance and, indeed, involves plaintiff's own input. The process is consistent with common-sense detention practice.

B. Plaintiff Is Provided Appropriate Mental Health Care.

Plaintiff's motion also alleges that plaintiff faces irreparable harm due to mental health crisis. *See* Pl's Mot. at 11-12. In essence, plaintiff argues that mental health care at the Brig has been unlawfully inadequate. Contrary to plaintiff's allegations, however, far from neglecting plaintiff's

mental state, the Brig provides plaintiff with appropriate and attentive mental health monitoring in addition to the extensive opportunities for intellectual stimulation and interaction with others described above.

As a routine matter, the Brig monitors plaintiff's daily activities to identify any negative trends in plaintiff's physical or mental well-being, so that intervention can be made as appropriate. Such activities include hygiene practices, recreation, sleep patterns, interactions with staff, eating habits, medical visits, and prayer routines. Pucciarelli Decl. ¶ 5. (As noted previously, plaintiff has gained weight over approximately the last year, which the Brig attributes to healthy eating and a regular exercise routine. *Id.*) Furthermore, a mental health professional visits the SHU approximately monthly. Pucciarelli Decl. ¶ 5; Wright Decl. ¶ 31. During the visit, the mental health professional reviews the data on these activities and other logs pertaining to plaintiff, has discussions with Brig staff concerning plaintiff, and attempts to visit with him. Pucciarelli Decl. ¶ 5. Beyond these regular visits, plaintiff can request a visit by the mental health professional (or other medical staff member) at any time. *Id.*; *id.* ¶ 7. So far, these mental health providers have not recommended a need for treatment or more frequent screening visits for plaintiff; were such recommendations made, the Brig would take steps to provide recommended treatment. *Id.* ¶ 7.

In addition, Brig staff who are involved in daily interactions with plaintiff, as well as members of the Brig senior staff, are acquainted with plaintiff and his behaviors and routines, and so are well-positioned to detect and be sensitive to any changes that may arise in plaintiff's behavior. Pucciarelli Decl. ¶¶ 4-6. In the event that plaintiff either reported a mental health concern or the Brig staff observed a negative change in his behavior, the Brig, in addition to taking any necessary

steps to ensure plaintiff's safety, would arrange for an evaluation of plaintiff by a mental health professional so that appropriate treatment could be undertaken. *Id.* ¶ 6.

Accordingly, far from neglecting plaintiff's mental health, DoD is providing plaintiff with appropriate and attentive mental health monitoring, including by mental health professionals. Consequently, plaintiff has not carried his burden of establishing an imminent threat of irreparable harm related to his mental health state.

In light of the mental health monitoring provided by the Brig and the availability of mental health care where necessary, the opinions of Dr. Grassian submitted with plaintiff's motion (*see* Pl's Mot., Exhibit B ("Grassian Decl.")) should not be taken as establishing "actual and imminent" irreparable harm. *See Direx*, 952 F.2d at 812. Indeed, Dr. Grassian's submission seems to be based on a general bias against what he calls "solitary confinement." *See* Grassian Decl. at 5-6. Dr. Grassian's conclusions on that subject, however, have been criticized as lacking sufficiently reliable empirical bases.[8] *See* David A. Ward & Thomas G. Werlich, *Alcatraz and Marion, Evaluating super-maximum custody*, PUNISHMENT & SOCIETY 5(1) (2003) at 53, 61 (copy attached as Exhibit 4 for the Court's convenience) (criticizing Dr. Grassian's 1983 paper, *"Psychopathological effects of solitary confinement,"* AMERICAN JOURNAL OF PSYCHIATRY 140(11)).

Moreover, with regard to this specific case, Dr. Grassian's opinion relies primarily upon the characterizations of plaintiff's attorneys regarding plaintiff's conditions of confinement (past and present) and regarding his condition. *See*, *e.g.*, Grassian Decl. at 11 ("Mr. Almarri's attorneys have

[8] Dr. Grassian's conclusions here appear to be grounded in his 1983 paper criticized in Ward & Werlich. While his declaration in this case cites his 2006 paper, "*Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J. of Law & Pol'y 325 (2006), that paper relies upon that prior research. *See id.* at 334 n.15.

described how the absence of fixed rules and the discretionary nature of decisions that govern everything in his life, along with his prolonged and complete social isolation, have increased Mr. Almarri's feelings of hopeless, despair, utter vulnerability, and his increasing irritability."). Of course, the declarations submitted by defendant dispute plaintiff's counsel's hyperbolic characterizations of many of plaintiff's conditions of confinement and his mental condition. *See supra* at 6-15. Indeed, Dr. Grassian's submission fails in significant respects to account for plaintiff's actual conditions of confinement. For example, Dr. Grassian complains about the allegedly isolating effect caused by the process of screening of books requested by plaintiff, *see* Grassian Decl. at 11, but he says nothing about the hundreds of volumes of works to which plaintiff has daily access and the thousands more to which plaintiff has library privileges. *See supra* at 9. Dr. Grassian's submission also appears to rely in part on plaintiff's alleged erratic sleep cycles during the Fall of 2007. *See* Grassian Decl. at 14. This period of time, however, coincides with the Ramadan period, when the Brig accommodated plaintiff's request to change his sleep-wake cycle for purposes of facilitating his ability to keep the Ramadan fasting requirements. *See supra* at 10-11. Dr. Grassian also adopts plaintiff's characterization that all of his privileges are subject to the caprice of the Brig, *see* Grassian Decl. at 14, when that characterization is not accurate, as defendant has demonstrated, *see supra* at 11-12. Dr. Grassian goes so far as to describe plaintiff's conditions of confinement, which involve numerous extraordinary, even generous, accommodations in light of the uniqueness of the situation – such as a large living area with ready access to television, exercise equipment, a personal computer, daily visits by Brig senior staff, and a library including well over 300 volumes – as "some of the most severe conditions seen in any American prison setting," Grassian Decl. at 16, and even akin to those of "individuals . . . incarcerated brutally in some third-

world countries," *id.* at 15. These unrealistic bases of Dr. Grassian's submission with respect to plaintiff undermine Dr. Grassian's conclusions and the attempt to use the submission as a basis for plaintiff establishing non-speculative and imminent irreparable harm; that the submission does not establish imminent irreparable harm is all the more true in light of the contrary evidence regarding plaintiff submitted by defendant.[9]

* * *

Accordingly, far from the misleading portrayal offered in plaintiff's motion, plaintiff's detention arrangement provides him a number of extraordinary accommodations and privileges rarely seen in the military detention of enemy combatants. Plaintiff has regular and meaningful opportunities for human interaction, intellectual stimulation, exercise, and communication with family members. In addition, plaintiff's mental health is regularly monitored, with appropriate, attentive care readily available as needed. Plaintiff, therefore, has failed to carry his burden of demonstrating actual and imminent irreparable harm.

II. THE BURDEN ON THE MILITARY THAT WOULD RESULT FROM PLAINTIFF'S REQUESTED INTERIM RELIEF WARRANTS DENIAL OF PLAINTIFF'S MOTION.

Not only has plaintiff not established actual and imminent irreparable harm, when the Court considers the burden on defendant that would result from granting plaintiff's requested interim relief, it is clear that such relief should be denied.

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[9] Other courts have previously criticized or rejected Dr. Grassian's opinions concerning the mental condition of individual prisoners. *See United States v. Hammer*, 404 F. Supp. 2d 676, 726 (M.D. Pa. 2005) (Findings of Fact nos. 574-583) (rejecting Dr. Grassian opinion as not credible); *State v. Ross*, 863 A.2d 654, 663-64, 673 (Conn. 2005) (rejecting Dr. Grassian's opinion as speculative).

Considerations of the burden on the military of plaintiff's requested relief, at the outset, should be informed by the unique circumstances of this case. This action, like plaintiff's *habeas* action pending in the Court of Appeals, implicates substantial constitutional questions concerning separation of powers. Defendants are aware of no court in the history of this country having intervened to exercise control of the conditions of confinement of an enemy combatant detained during wartime. That is true, moreover, even though there were hundreds of thousands of alien enemy combatants detained by the United States military within the borders of the United States during World War II. Indeed, the capture and detention of enemy combatants is "by universal agreement and practice, an important incident[] of war." *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (internal quotations omitted). The purpose of such detention is to prevent captured individuals from "serving the enemy." *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) (*quoted in Hamdi*, 542 U.S. at 518). And "core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." *Hamdi*, 542 U.S. at 531 (plurality opinion).

This case, therefore, implicates significant separation-of-powers concerns and calls into question core military judgments during a time of war. For these reasons, the Supreme Court's directive in *Hamdi*, 542 U.S. at 539-40 (plurality opinion), that any "factfinding process" as part of *habeas* proceedings involving enemy combatants must be "both prudent and incremental" and that courts "proceed with the caution that is necessary" to limit intrusion into the Executive's unique interests in detaining enemy combatants during wartime, is equally applicable to a challenge to plaintiff's conditions of confinement and to a plaintiff's attempt to obtain interim, injunctive relief seeking to control or alter such conditions.

Even in cases involving prisoners held in connection with the domestic criminal justice system, courts accord substantial deference to the judgment of prison administrators and generally refrain from second-guessing and interfering with the day-to-day operations of prison facilities. *See Taylor v. Freeman*, 34 F.3d 266, 268-69 (4th Cir. 1994) ("absent the most extraordinary circumstances, federal courts are not to immerse themselves in the management of . . . prisons"); *see also Bell v. Wolfish*, 441 U.S. 520, 548, 562 (1979) (explaining that the operation of even domestic "correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial," and cautioning lower courts to avoid becoming "enmeshed in the minutiae of prison operations."); *Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989) ("Acknowledging the expertise of these officials and that the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world.").

Accordingly, considerations of the burden on the military that would result from granting plaintiff's requested interim relief should include and be especially sensitive to the unique circumstances of this case. As explained below, the burden on defendant occasioned by plaintiff's requested relief warrants that the relief be denied.

Plaintiff's motion is wide-ranging in its rhetorical attacks on plaintiff's conditions of confinement, but the interim relief plaintiff seeks boils down to four discrete requests: (1) that defendants be required to allow plaintiff "regular and frequent (monitored) telephone calls with immediate family members (now in Saudi Arabia);" (2) that defendants be required to process "rapid[ly]" plaintiff's correspondence with family members "(including letters and DVDs);" (3) that

defendants be forced to grant plaintiff "*unrestricted* access to news (in newspapers, in magazines, and on television);" and (4) that defendants be required to provide plaintiff "full and prompt access to religious texts."[10] *See* Pl's Mot. at 3-4 (emphasis added).

Unrestricted Access to News. As noted in the declarations submitted with defendants' response, while plaintiff has regular access to newspapers and television, plaintiff is not permitted to access television news programs, and the printed media to which he has access is redacted to eliminate stories related to the ongoing war on terror. *See supra* at 9-10. One of the most evidently burdensome aspects of plaintiff's requested interim relief is his request for "unrestricted access" to news media in all its forms – newspapers, magazines, and television. While not redacting printed media and not restricting or monitoring television channels or shows viewed by plaintiff would alleviate defendants from having to undertake such screening measures, the burdens on defendants occasioned by such an arrangement would be dramatic, indeed. Plaintiff is asking for a court order prohibiting the military from withholding from an enemy combatant detainee news of a war's progress – and perhaps the whereabouts and status of fellow combatants and their hostile acts or plans – while that war is ongoing. The threat to the core purposes of enemy combatant detention are manifest. The pernicious effects on the military of such an order and corresponding "unrestrained" access to news could range from encouraging belligerence while in detention (should the detainee, for example, learn of news of a particular setback for the United States and its coalition partners in the war) to interference with the government's ability to obtain intelligence from the detainee in the

[10] Plaintiff states that the requested relief is that which should be provided, "[a]t a minimum." Pl's Mot. at 3. To the extent that plaintiff seeks unspecified interim injunctive relief in addition to the specific items of relief requested in his motion, however, the motion is improper. *See infra* at note 13 & accompanying text.

future.[11] Allowing unrestricted access to media would even permit plaintiff, a confirmed al Qaeda agent, to learn of reported statements and plans of Osama Bin Laden and other al Qaeda leaders in their fight against the United States and its coalition partners. The immediate risk to Brig staff in the first instance, and to national security interests in the latter two, are manifest.[12] Such burdens warrant denial of the requested relief.

Full Access to Religious Texts. Plaintiff's request for an injunction requiring "full and prompt" access to religious texts appears to translate into "unrestricted" access for plaintiff to religious texts of his own choosing, and, as such, imposes improper burden upon defendants. As explained *supra* at 10-11, defendants have undertaken extraordinary steps to facilitate plaintiff's practice of his religion, including providing him with his own Islamic library containing well over 300 volumes. Further, the military has established an effective system for screening books that may be provided to detainees. *See* Zanetti Decl. ¶¶ 2, 13-16. The military has compiled a list of 1,500 Arabic titles approved for release to detainees such as plaintiff and further established a process for review of titles not on the list. *Id.* ¶ 13; Pucciarelli Decl. ¶ 11. This system balances making such materials available to detainees while also addressing security concerns that certain books or materials could be used, among other things, to incite detainees or otherwise create security issues. *See* Zanetti Decl. ¶¶ 14-15. Under this process, plaintiff has received access to a multitude of books,

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[11] The military has not been interrogating plaintiff since sometime in 2004, although it is widely recognized that lawfully detained enemy combatants may be interrogated by the military to obtain information to further the war effort. *See*, *e.g.*, L. Oppenheim, INTERNATIONAL LAW 368-369 (H. Lauterpacht ed., 7th ed. 1952).

[12] Indeed, in litigation pertaining to detainees held at Guantanamo Bay, prohibitions on detainee counsel providing to detainees news and current events information not directly related to the representation have been implemented. *See Bismullah v. Gates*, 501 F.3d 178, 189-90 (D.C. Cir. 2007); *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174, 187, 188 (D.D.C. 2004).

including 96 volumes of religious texts requested by him or on his behalf since November 2007. *See* Zanetti Decl. ¶ 16. Plaintiff's proposed injunctive relief seeks to supplant these careful (and generous) steps with a system where plaintiff can obtain any religious text of his choosing, regardless of any reasons that may exist for the military not approving of the release of a particular text.

In light of this burden, the fact that defendants have undertaken extraordinary measures to facilitate plaintiff's practice of his religion, and the fact that plaintiff has failed to demonstrate any significant burden upon his religious practice by the restriction of the religious texts referred to in his motion, *see infra* at 33-34, plaintiff's request for an injunctive permitting unrestricted access to any religious text should be denied.

Frequent Telephone Calls with Family Abroad. As discussed, the miliary is currently in the process of facilitating telephone calls between plaintiff and members of plaintiff's family overseas on a semi-annual basis. The burden likely to be occasioned by plaintiff's requested court order requiring that he be permitted "regular and frequent" telephone calls with family members overseas, however, is significant. First, plaintiff does not define what he means by "regular and frequent" calls, and such a requirement would run afoul of FED. R. CIV. P. 65(d)'s definiteness standard.[13] That provision "was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). A problem with

[13] Federal Rule of Civil Procedure 65(d) provides in pertinent part:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . . .

plaintiff's requested relief is that the phrase, "regular and frequent" is susceptible of varying interpretations and is little more than an invitation for plaintiff to seek contempt whenever he feels like his family telephone calls are not "frequent" enough. *See also Common Cause v. Nuclear Regulatory Comm'n*, 674 F.2d 921, 926-27 & n.11 (D.C. Cir. 1982) (noting that Fed. R. Civ. P. 65(d) standard is "exacting" and collecting cases striking down injunctions lacking sufficient clarity and detail).

Second, plaintiff's requested injunctive order imposes hardship on defendants by increasing the frequency of necessary logistical undertakings by the military to arrange for overseas calls, with needed call participant vetting and identity verification. Further, increasing the frequency of such privileges also increases the possible risk that the necessary vetting and verification in any particular case will not be thorough or effective enough as a security measure.

Such issues and burdens warrant denial of the requested relief, especially in light of the fact that international family telephone calls for plaintiff are proceeding, as discussed *supra*, and that plaintiff is permitted to correspond with his family by mail and to receive videos from them.

Rapid, Multimedia Correspondence. Plaintiff's request for "rapid" processing of his family correspondence will also result in improper burden on defendants.[14] As an initial matter, an injunction requiring "rapid" processing suffers from the same defect in definiteness as plaintiff's proposal that "frequent" phone calls be ordered. *See supra* note 13 & accompanying text. Beyond that, however, plaintiff's request would serve potentially to disrupt or undermine the government's

[14] Plaintiff does not contest the government's prerogative to screen plaintiff's mail, nor could he. *Cf.*, *e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 76 (Aug.12, 1949) (permitting censoring of prisoner-of-war correspondence).

processes for screening of detainee mail during wartime. The military has in place a multilayered process that ensures that mail going to and from detainees contains neither physical nor written contraband so that it is neither dangerous nor likely to create other problems. *See* Zanetti Decl. ¶¶ 3-8. Plaintiff's correspondence is screened and cleared at military facilities connected with the detention facility at Guantanamo Bay, Cuba, because the Brig does not have the resources to conduct such screening. *See id.* ¶¶ 2, 7; Pucciarelli Decl. ¶ 12. This process supports both the security of detention facilities and other wartime interests. *See* Zanetti Decl. ¶ 3. The Guantanamo Bay facility has screened over 88,000 pieces of mail to and from detainees since 2003. Linguists are required to translate the mail after which it is appropriately screened and redacted, as necessary. *Id.* While screening and processing of detainee mail is a priority, the demand on resources and fluctuations in mail volume, including as a result of holiday-related correspondence, can result in the screening process taking several months in some cases. *Id.* ¶ 5-6, 8. In light of the uniqueness of his situation, plaintiff is also permitted to receive DVD video clips from his family; these videos are subject to a screening process similar to the mail. *Id.* ¶ 11.

Plaintiff's proposal apparently to impose time constraints on the mail process would lead to several potential improprieties or harms. For example, it could require inappropriate prioritization of plaintiff's mail over that of other detainees within the current system or the diversion of resources from the current mail screening process to address plaintiff's mail individually, to the detriment of the current system (responsible for more than 88,000 letters since 2003) and, ultimately, other detainees. Alternatively, it could require a level of haste or cursoriness in review that could increase risks respecting the effectiveness of the review. Plaintiff even appears to contemplate establishment of screening resources at or near the Brig; because such resources do not currently exist there,

however, such a requirement would result in significant expense and burden on the military to establish those resources.[15]

It should be noted that efforts to improve processing times of plaintiff's mail and videos are being implemented, including elimination of processing of non-family holiday cards, changes to the routing of mail to help avoid misrouting or misplacement and associated delays of the mail at the screening facility, and electronic transmission of submitted video clips for screening. *See* Pucciarelli Decl. ¶ 12. While the military does not control the speed with which mail is delivered by organizations not associated with the military,[16] including U.S. and international mail systems, it is making efforts to reduce several other possible sources of delays in the processing of plaintiff's mail that the military can control.[17]

In light of the burdens occasioned by plaintiff's requested injunction, as well as the fact that defendants are taking steps in an attempt to improve mail processing time, plaintiff's requested relief should be denied.

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[15] Such an arrangement would also be burdensome and problematic because it would detract from the centralization of expertise and experience in detainee mail screening at Guantanamo Bay, thereby increasing risks respecting the effectiveness and thoroughness of the review.

[16] Significant amounts of detainee mail are routed to and from family members through the International Committee for the Red Cross. *See* Zanetti Decl. ¶¶ 5, 7.

[17] As reflected in General Zanetti's declaration, with the exception of one package of mail that fell victim to misrouting or misplacement and, thus, took an extraordinarily long time to make its way through mail processing, the mail and DVD items about which plaintiff complains in his motion have taken two to four months to process, with the translation and screening process taking one to three months. *See* Zanetti Decl. ¶¶ 9-10, 12. Plaintiff also fails to mention approximately six pieces of family mail to or from plaintiff since September 2007, the processing of which, by the military, took an average of two to three months. Additionally, the latest set of video clips from plaintiff's family submitted in February 2008 were provided to plaintiff last week.

Other Issues. Aside from the improper burdens associated with plaintiff's specific requests for injunctive relief, plaintiffs' request also present other improper burdens and harms more generally. To the extent plaintiff's requested relief, in effect, would guarantee plaintiff access to news and books via an injunction enforceable through contempt, the relief would impinge on the Brig's legitimate system of promoting good behavior by plaintiff through the availability of privileges that are subject to removal for bad conduct, *see supra* at 11-12, and would provide plaintiff leverage for manipulation of his captors.

Accordingly, the burdens on the military that would result from granting plaintiff's requested interim relief in this unique context of wartime detention of enemy combatants warrant that plaintiff's motion be denied.

III. PLAINTIFF'S CHALLENGE TO HIS CONDITIONS OF CONFINEMENT IS NOT LIKELY TO SUCCEED ON THE MERITS.

As discussed *supra* plaintiff's requested injunction lacks an appropriate factual basis; furthermore, if granted, it will create inappropriate burdens on the military. Plaintiff's motion should also be denied because plaintiff is unlikely to succeed on the merits. Not only does this Court lack jurisdiction over this matter under the terms of the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, § 7, 120 Stat. 2600, plaintiff's motion lacks an adequate legal basis for the relief plaintiff requests. When a plaintiff fails to make a showing that the balancing of the hardships tips "decidedly" in his favor, the plaintiff must demonstrate a *strong* probability of success on the merits in order to obtain interim injunctive relief. *See Direx*, 952 F.2d at 813-14. Whatever the result of the balancing of hardships in this case, however, plaintiff has not made a showing of likelihood of success sufficient to obtain the injunctive relief he seeks.

A. Plaintiff's Motion Should Be Denied Because a Substantial Question of this Court's Jurisdiction over the Case Is Pending.

Plaintiff cannot show a likelihood of success on his claims because a serious question exists regarding this Court's jurisdiction over this case under the MCA. On October 17, 2006, the MCA was enacted. The MCA amended the habeas statute, 28 U.S.C. § 2241, adding a subsection (e) to provide that "[n]o court, justice, or judge shall have jurisdiction" to consider either (1) habeas petitions filed by an alien "detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination," or (2) any other action "relating to any aspect of the detention, transfer, *treatment*, trial, or *conditions of confinement*" of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination" (except for the exclusive review granted to the Court of Appeals for the District of Columbia Circuit under the Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, Tit. X, 119 Stat. 2680, for seeking review of the final decision of a DoD Combatant Status Review Tribunal ("CSRT") that an alien is properly designated as an enemy combatant).[18] *See* 28 U.S.C. § 2241(e) (emphasis added). This new amendment to § 2241 took effect on the date of enactment and applies specifically "to all cases, without exception, pending on or after the date of the enactment of this Act which relates to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." MCA § 7(b). Thus, pursuant to

[18] *See* DTA § 1005(e)(2)-(3) (as amended by MCA §§ 9-10). Section 1005(e)(2) of the DTA, as amended, states that the D.C. Circuit "shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant," and it further specifies the scope and intensiveness of that review.

the MCA, the Court has no jurisdiction to consider this conditions of confinement case if plaintiff, who is an alien, falls within the terms of the statute as one "detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("'Without jurisdiction [a] court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'") (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868).

As the government has explained in the appeal of plaintiff's pending *habeas* case, plaintiff comes within the terms of the MCA because he is an "alien detained by the United States" who has "been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." *See* 487 F.3d 160, 168-69 (4th Cir. 2007). A panel of the Court of Appeals has rejected this argument, *id*. at 173, but the question is now before the Court of Appeals *en banc*. *See* Order, *Al-Marri v. Wright*, No. 06-7427 (Aug. 22, 2007). The case was argued on October 31, 2007, and is still under submission.

Given the serious question regarding this Court's jurisdiction, which remains pending before the *en banc* Court of Appeals, the Court should refrain from granting plaintiff's requests for interim injunctive relief.

B. Plaintiff Cannot Demonstrate Likelihood of Success on His Constitutional Claims Because No Waiver of Sovereign Immunity Exists for Such Claims.

Plaintiff additionally cannot demonstrate a likelihood of success sufficient to warrant the relief he requests because plaintiff's claims in this case are barred by sovereign immunity.[19] As more fully discussed in the briefing in support of defendants' motion to dismiss this case, no applicable waiver of sovereign immunity exists for plaintiff's constitutional claims.[20] Sovereign immunity is not waived under provisions of the Constitution relied on by plaintiff; neither is sovereign immunity waived by the Administrative Procedures Act ("APA"), 5 U.S.C. § 702. *See* Defs' Mot. to Dismiss at 7-16 (dkt. no. 7); Defs' Reply in Support of Mot. to Dismiss at 2-7 (dkt. nos. 11, 14).

C. Plaintiff Cannot Demonstrate Likelihood of Success on His Constitutional Claims Because No Adequate Legal Basis Exists for Such Claims.

Even if jurisdiction and a waiver of sovereign immunity existed with respect to plaintiff's claims, plaintiff lacks a legal basis for his claims sufficient to demonstrate a likelihood of success on his requests for relief. As a threshold matter, plaintiff asserts that he has enforceable rights under the First and Fifth Amendments to the Constitution that enable him to challenge his conditions of

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[19] *See Powelson v. United States*, 150 F.3d 1103, 1104-05 (9th Cir. 1998) (for a federal court to adjudicate a case, both a waiver of sovereign immunity and a grant of subject matter jurisdiction must exist).

[20] Defendants also explained in their motion to dismiss briefing that the Geneva Conventions provide no basis for relief for plaintiff because these treaties do not provide private parties with judicially enforceable rights. *See* Defs' Mot. to Dismiss at 9-10; *see also Medellin v. Texas*, No. 06-984, 2008 WL 762533, at *10 & n.3 (S. Ct. Mar. 25, 2008) (noting presumption that treaties do not provide private parties with judicially enforceable rights). Since the filing of defendants' motion to dismiss, this proposition has been enacted in statutory form in the MCA. Section 5(a) of the MCA provides that no person may invoke the Geneva Conventions as "a source of rights" in any civil court proceeding to which "the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party." *See* MCA § 5(a) (codified at 28 U.S.C. § 2241 (note)). The MCA thus clarifies settled law that the Geneva Conventions do not create judicially enforceable rights in favor of private individuals.

confinement. *See* Pl's Mot. at 13-14. The government has assumed plaintiff, who is held in the United States, may assert constitutional rights, but has explained that any evaluation of the scope and nature of those rights must take into account the unique circumstances surrounding his presence in the country. Here, plaintiff is an alien enemy combatant, who entered this country intending to commit or facilitate hostile or war-like acts, and he is being held as an enemy combatant by the military during wartime; he is neither a citizen nor a typical prisoner or detainee in the domestic criminal justice system.

No court has ever definitively determined what constitutional rights may be invoked in such circumstances,[21] or what legal standard should be applied to evaluate constitutional challenges to conditions of confinement brought by alien enemy combatants in the custody of the military in this country during wartime. In the domestic criminal justice system, challenges to prison conditions by convicted criminals have proceeded under the Eighth Amendment's "deliberate indifference" standard, which requires a prisoner to establish that prison officials "were knowingly and unreasonably disregarding an objectively intolerable risk of harm to the prisoners' health or safety."[22]

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[21] The Court of Appeals panel in plaintiff's pending *habeas* case specifically addressed only plaintiff's procedural due process rights in regard to challenge to his enemy combatant status. *See Al-Marri v. Wright*, 487 F.3d 160, 174-77 (4th Cir. 2007), *reh'g en banc granted* (Aug. 22, 2007).

[22] This standard is applicable both to claims alleging inadequate medical care as well as challenges to general conditions of confinement, such as inadequate food, clothing, and cell temperature. *See Wilson v. Seiter*, 501 U.S. 294, 303 (1991) ("Whether one characterizes the treatment received by the prisoner as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard articulated in *Estelle* [*v. Gamble*, 429 U.S. 97 (1976)]"). The two-prong deliberate indifference test requires the moving party to establish first that "the deprivation alleged must be, objectively, sufficiently serious, . . . a prison official's act or omission must result in the denial of the minimal civilized measure of life's necessities"; second, a prison official must have a "sufficiently culpable state of mind" – "one of deliberate indifference to inmate health or safety." *Farmer*, 511 U.S. at 834 (internal quotations omitted).

See Farmer v. Brennan, 511 U.S. 825, 834-35, 846 (1994). Challenges brought by pre-trial detainees not yet convicted of crimes, however, are governed by due process considerations rather than the Eighth Amendment. *See*, *e.g.*, *Hill v. Nicodemus*, 979 F.2d 987, 990 (4th Cir. 1992). "Most courts have applied the 'deliberate indifference' standard in both settings, *see Hill*, 979 F.2d at 991-92 (collecting cases)." *O.K. v. Bush*, 344 F. Supp. 2d 44, 60 n.23 (D.D.C. 2004).

Furthermore, with respect to constitutional challenges to specific regulations and policies in the conventional domestic prison context, the Supreme Court has recognized that "the constitutional rights prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large," *Shaw v. Murphy*, 532 U.S. 223, 229 (2001) (internal citations omitted). In that context, the Court has typically declined to attempt to define with precision the scope of various asserted constitutional rights; rather, when a prison regulation impinges on specific constitutional rights of an inmate, the Court considers whether the challenged rules "bear a rational relation to legitimate penological interests," recognizing all the while the need for "substantial deference to the professional judgment of prison administrators" in furthering legitimate goals of detention. *See Overton v. Bazzetta*, 539 U.S. 126, 131-32 (2003) (citing *Turner v. Safely*, 482 U.S. 78, 89 (1987)); *see also* cases cited *supra* at 17-18, 31-32.[23]

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[23] The Court has also described four factors "relevant in determining the reasonableness of the regulation at issue," *i.e.*, (1) whether "a valid rational connection between the prison regulation and the legitimate governmental interest put forward to justify it;" (2) whether the prisoners have alternative means of exercising the right at issue; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally;" and (4) "the absence of ready alternatives" that "fully accommodate[] the prisoner's rights at de minimis cost to valid penological interests." *Turner*, 482 U.S. at 89-91 (internal quotation marks omitted). The Court has concluded, however, that these factors are not equally useful in every context. *See Beard v. Banks*, 548 U.S. 521, 126 S. Ct. 2572, 2580 (2006) (plurality) (noting that second, third, and fourth factors add little to reasonableness analysis in context of

Of course, the criminal justice interests served by confining individuals in the criminal justice system are completely distinct from the military and national security interests served by detaining individuals, such as plaintiff, in conjunction with ongoing hostilities. *Cf. Padilla v. Hanft*, 423 F.3d 386, 395 (4th Cir. 2005) (distinguishing criminal detention from military detention of enemy combatants). Accordingly, separation-of-powers principles undoubtedly require even more stringent standards for judicial intervention into the practices of a military detention facility during a time of war. *See*, *e.g.*, *Hamdi*, 542 U.S. at 531 (plurality opinion) ("Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them."); *id.* at 518 ("The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants is to prevent captured individuals from returning to the field of battle and taking up arms once again."). *See also O.K. v. Bush*, 377 F. Supp. 2d 102, 112 n.10 (D.D.C. 2005) ("No federal court has ever examined the nature of the substantive due process rights of a prisoner in a military interrogation or prisoner of war context."). Indeed, due process standards depend on the context and nature of interests involved. *See id.*

The consistent theme even under the standards applied in the prison context, however, is one of deference to those professionals charged with detaining prisoners. *See Bell v. Wolfish*, 441 U.S. 520, 548, 562 (1979) (explaining that the operation of even domestic "correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial," and cautioning lower courts to avoid becoming "enmeshed in the minutiae of prison

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consideration of policy denying newspapers, magazines, and photographs to especially dangerous and recalcitrant inmates where such denial was intended as an incentive for good behavior).

operations."); *Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989) ("Acknowledging the expertise of these officials and that the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world."). The government is entitled, at the very least, to that level of deference in considering the constitutional claims of an enemy combatant detained by the military during a time of war (and, in view of the extraordinary separation of powers considerations presented in this context, the government should be entitled to even greater deference). Application of even that "ordinary" level of deference makes clear that plaintiff has no sufficient likelihood of success on his claims to warrant the relief he seeks.

As explained *supra* at 6-14, it is clear, first of all, that the facts do not support a conclusion that the Brig is being "deliberately indifferent" to plaintiff's health or well-being. Indeed, the military has taken extraordinary steps to provide plaintiff accommodations sensitive to the uniqueness of his situation,[24] as well as diligent and regular mental health monitoring. Furthermore, plaintiff does not cite specific authority for the assertion that a captured enemy combatant, and in

[24] It should be noted that other courts have found no constitutional problems even with various forms of long-term maximum custody and isolation of prisoners. *See*, *e.g.*, *Bruscino v. Carlson*, 854 F.2d 162, 168 (7th Cir. 1988) (rejecting Eighth Amendment challenge to permanent "lockdown" conditions at federal super-max prison, which maintained inmates in one-man cells with only 7 to 11 hours of recreation in a small enclosure permitted per week); *Hill v. Pugh*, 75 Fed. Appx. 715, 2003 WL 22100960 at ** 4-** 5 (10th Cir. 2003) (finding that federal prisoner's placement in a maximum security prison where he was isolated in his cell for twenty-three hours a day and suffered from sensory deprivation did not implicate due process rights under the Fifth Amendment or constitute cruel and unusual punishment under the Eighth Amendment where prisoner's minimal physical requirements for food, shelter, clothing, and warmth were satisfied) (copy attached as Exhibit 5) (consistent with the rules of the Tenth Circuit Court of Appeals, the unpublished opinion in Hill is cited for its persuasive value. *See* 10th Cir. R. 36.3 (B)).

particular an alien enemy combatant such as himself, during wartime has broad First Amendment rights to unrestricted news access or library materials of his choosing, or to correspondence and telephonic communication with family members of a certain speed or frequency. Nonetheless, defendants have explained why the restrictions in these matters are legitimate, rational, and justified in the context of wartime detainees. *See supra* at 16-25; *cf. Beard v. Banks*, 548 U.S. 521, 126 S. Ct. 2572, 2580 (2006) (plurality) (policy denying newspapers, magazines, and photographs altogether to recalcitrant inmates legitimately justified as means of increasing incentives for better prison behavior). This is especially true in light of the numerous accommodations made to plaintiff to assist him in areas of intellectual stimulation, religious practice, and permissible contact with others.

Accordingly, plaintiff cannot demonstrate a likelihood of success on the merits of his constitutional claims, and his requests for interim relief must be denied.

D. Plaintiff Cannot Demonstrate Likelihood of Success on His RFRA Claims.

Likewise, plaintiff cannot demonstrate a likelihood of success with regard to his RFRA claims. RFRA requires a showing that the government has "substantially burdened" the practice of a litigant's religion. *See* 42 U.S.C.A. § 2000bb-1(a). Individuals asserting RFRA claims have the initial burden of establishing that the government has substantially interfered with their exercise of religion. *See Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997); *Woods v. Evatt*, 876 F. Supp. 756, 762 (D.S.C. 1995) (Anderson, J.). Further, the burden "must be more than mere inconvenience or a less desirable situation;" "'the burden must be substantial and an interference with a tenet or belief which is central to religious doctrine.'" *Woods*, 876 F. Supp. at 762 (quoting *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 718 (1981)).

No such showing has been made here. The military has gone to extraordinary lengths to accommodate plaintiff's practice of his religion, including providing him with a library for his personal use consisting of well over 300 volumes of religious texts and accommodations for prayer and the observance of Ramadan. *See supra* at 10-11. Plaintiff makes no competent showing of a "substantial" burden on his religious practice under RFRA, including how the denial of access to the specific religious texts concerning which he complains is an interference with a central tenet of the practice of Islam. This is especially the case in light of his access to the hundreds of volumes of religious texts permitted him by the military.

IV. DENYING PLAINTIFF'S MOTION FOR INTERIM RELIEF WOULD BEST SERVE THE PUBLIC INTEREST.

Considerations of the public interest also warrant denying plaintiff's requested interim relief. The public has a strong interest in assuring that operations related to the detention and care of enemy combatants are not interrupted, overly burdened, and second-guessed by the unnecessary demands of plaintiff pertaining to the particulars of his confinement conditions. *See*, *e.g.*, *Hamdi*, 542 U.S. at 531 (stating that "[w]ithout doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them"). Those interests are particularly strong with respect to a detainee's attempt to obtain such disruptive (though ongoing) relief on a preliminary record, without full evaluation of his claims through the typical merits litigation process. As demonstrated above, the military has taken extraordinary measures to address the needs, and even desires, of plaintiff. The prospect of the Court nonetheless becoming entangled, through an improper interim injunction, in the minutiae of Brig detention operations, at plaintiff's behest and on a truncated record, indicates that such relief would

be contrary to the public interest as reflected in the caselaw. *See supra* at 17-18, 31-32; *see also supra* at 16-25 (noting burdens on military occasioned by plaintiff's proposed relief). Further, there is simply no reason for the Court to reach the difficult constitutional issues raised by plaintiff's request for relief while plaintiff's separate *habeas* case remains pending before the Court of Appeals; while defendants' motion to dismiss remains pending in this case; and where plaintiff's conditions of confinement not only have been appropriate under the circumstances, but have continued to improve over time. *Cf. Hamdi*, 542 U.S. at 538-39 (plurality opinion) (adjuring lower courts generally to "proceed with the caution that is necessary" and to take only "prudent and incremental" steps when faced with novel issues pertaining to petitions for writs of habeas corpus from detainees involved in the current war on terror). Accordingly, the public interest would best be served if plaintiff's extraordinary motion for interim relief were denied.

CONCLUSION

For the foregoing reasons, respondents respectfully request that plaintiff's motion for interim relief be denied in all respects.

Dated: April 14, 2008

Respectfully submitted,

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

KEVIN F. MCDONALD
Acting United States Attorney

By: /s/ C. Todd Hagins
Christopher Todd Hagins (#9218)
Assistant United States Attorney
1441 Main Street, Suite 500
Columbia, South Carolina 29201
Tel. (803) 929-3000

TERRY M. HENRY
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W. Room 7212
Washington, DC 20530
Tel: (202) 514-4107
Fax: (202) 616-8470

Attorneys for Defendants